United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

643

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,762

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 17 1966

Nathan J. Paulson
Clerk

JAMES R. GOODMAN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee,

On Appeal From the United States District Court
for the District of Columbia

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January 17, 1966

STATEMENT OF QUESTIONS PRESENTED

1. Does the word "such", which modifies "person" in the second sentence of Section 25 - 128, D.C. Code (1961), prevent that statute from being read so as to make drunk in public, without more, a crime, and if so, was it error to deny defendant's motion to suppress evidence resulting from his arrest for drunk in public?

2. Did the trial court err in excluding proffered testimony of an experiment tending to establish the physical impossibility of police eyewitness identification of defendant when defendant offers to prove that the circumstances of the experiment were "identical" with the circumstances of the police identification?

3. Does the Mallory rule prohibit admission, over defendant's objection, of police testimony that, more than one hour after arrest, defendant stated he had been in a stolen car, when defendant's statement allegedly was made during a "conversation" at police headquarters at 4:00 a.m. before defendant was advised of his rights, either by a judicial officer or by police?

4. Did the trial court err in instructing the jury, over defendant's objection, that being a passenger in a stolen car, with guilty knowledge, constitutes unauthorized use when the indictment charged only that defendant had driven the car and when the only evidence of defendant's having been a passenger was defendant's statement described in question 3?

INDEX

STATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 2

CONSTITUTIONAL PROVISION, STATUTES, AND RULE INVOLVED 7

STATEMENT OF POINTS 8

SUMMARY OF ARGUMENT 10

ARGUMENT 17

I. Court admitted evidence obtained from arrest that was illegal because it was based on non-criminal conduct, namely, drunk in public 17

A. The words of the statute cannot grammatically be read to make drunk in public a crime . . 19

B. Section 25 - 128 should be read as appellant urges to preserve its constitutionality 25

C. Reading Section 25 - 128 as defendant urges will not hamper proper law enforcement 29

II. Court erroneously excluded defense testimony regarding experiment to impeach identification of defendant by key government witness 34

III. Court erroneously admitted police testimony that defendant made an incriminating statement during a period of unnecessary delay between arrest and arraignment 43

IV. The court erroneously instructed the jury on an issue neither raised by the indictment nor supported by the evidence 48

CONCLUSION 54

TABLE OF AUTHORITIES

CASES CITED	Page
Allen v. United States, 103 U.S.App.D.C. 184, 257 F.2d 188 (1958)	47
*Alston v. United States, U.S.App.D.C. , 343 F.2d 72 (1965)	14,45 46
Amsbary v. Grays Harbor Ry. & Light Co., 78 Wash. 379, 139 Pac. 46 (1914)	40
Ashwander v. T.V.A., 297 U.S. 288, 341 (1936) (Brandeis, J., concurring)	29
Berger v. United States, 295 U.S. 78 (1935)	52
Calder v. Bull, 3 Dallas (U.S.) 386 (1798)	26
Clifton v. United States, 54 App.D.C. 104, 295 Fed. 925 (1923)	51
In re Clonan's Estate, 28 N.Y.S.2d 83 (1941)	23
Collazo v. United States, 90 U.S.App.D.C. 241, 196 F.2d 573, cert. denied, 339 U.S. 987 (1952)	51
Crowell v. Benson, 285 U.S. 22 (1932)	29
Dasch v. Jackson, 170 Md. 251, 183 Atl. 534 (1936)	28
Easter v. District of Columbia, 209 A.2d 625 (D.C.Ct. App. 1965), appeal granted, October 27, 1965, No. 19, 365, D.C.Cir.	24,25

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* Authorities chiefly relied upon are marked by asterisks.

Goodall v. United States, 86 U.S.App. D.C. 148, 180 F.2d 397, cert. denied, 339 U.S. 987 (1950) 12,36

*Greenwell v. United States, 119 U.S.App.D.C. 43, 336 F.2d 962 (1964) 14,43, 46

Hamilton v. United States, 26 App.D.C. 382 (1905) 51

Harris v. United States, 8 App.D.C. 20 (1896) . . 51

Kotteakos v. United States, 328 U.S. 750 (1946) 15,53

Leonard v. Henderson, 118 Vt. 29, 98 A.2d 698 (1953) 41

Lever Bros. Co. v. Atlas Assur. Co., 131 F.2d 770 (7th Cir. 1942) 41,42

Meyer v. Nebraska, 262 U.S. 390 (1923) 27

Moore v. Sutton, 185 Va. 431, 39 S.E.2d 348 (1946) , 27

Morton v. United States, 79 U.S.App.D.C. 329, 147 F.2d 28, cert. denied, 324 U.S. 875 (1945) 36

Moser v. Fulk, 237 N.C. 302, 74 S.E.2d 729 (1953) 31

Nelson v. United States, 109 U.S.App.D.C. 392, 288 F.2d 376 (1961) 20

Perry v. United States, 118 U.S.App.D.C. 360, 360 F.2d 748 (1964) 43

Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) 26

---

* Authorities chiefly relied upon are marked by asterisks.

Ramey v. State, 40 Ga.App. 658
151 S.E. 55 (1929) 31

* Richardson v. State, 90 Md. 108,
44 Atl. 999 (1899) 12,37

Rucker v. United States, 92 U.S.App.D.C. 336,
206 F.2d 464 (1953) 48

Shapiro v. United States, 335 U.S. 1 (1948) . . . 29

* Sinclair v. United States, 49 App.D.C. 351,
265 Fed. 991 (1920) 15,50,
51

Smith v. State, 2 Ohio St. 511 (1853) 37,38

* Spriggs v. United States, 118 U.S.App.D.C.
248, 335 F.2d 283 (1964) 14,43

* State v. Hedgepeth, 230 N.C. 33, 51 S.E.2d
914 (1949) 12,38,
39,41

State v. Munger, 43 Wyo. 404, 4 P.2d 1094
(1931) 30,31

State v. Phillips, 228 N.C. 595, 46 S.E.2d
720 (1948) 39

State v. Waller, 7 N.C. 229 (1819) 31

Thomas v. Central Greyhound Lines, Inc.,
6 A.D.2d 649, 180 N.Y.S.2d 461 (1958) . . . 41

Thomas v. United States, 151 F.2d 183 (6th Cir. 1945)
48,50,
52

Ullmann v. United States, 350 U.S. 422 (1956) 29

*United States v. Bowen, 100 U.S. 508 (1879) 22,
23

---

*Authorities chiefly relied upon are marked by asterisks.

United States v. C.I.O., 335 U.S. 41 (1948) 29

United States v. Resnick, 299 U.S. 207 (1936) . . . 20

United States v. Rumely, 345 U.S. 41 (1953) 29

Velasquez v. United States, 244 F.2d 416 (10th Cir. 1957) 50

Vinci v. United States, 81 U.S.App.D.C. 386, 159 F.2d 777 (1947) 51

Williams v. United States, 94 U.S.App.D.C. 219, 215 F.2d 35 (1954) 47

STATUTES AND RULE

D.C. Code (1961)
Section 4 - 140 43
Title 22, various sections 24
Section 22 - 2204 46
*Section 25 - 123, as amended by Act of June 29, 1953, 67 Stat. 104 . . 10,11,18, 21,24,25,29, 30

Espionage Act, Act of June 15, 1917, §2, 40 Stat. 213, repealed by Act of June 25, 1948, §21, 62 Stat. 862 . . . 52

Federal Rules

Fed. Rules of Crim. Proc., Rule 30 . . 48

SECONDARY SOURCES

30 AM.JUR., Intoxicating Liquors § 37 (1958). . . . 30

Hearings Before A Subcommittee of the Senate Judiciary Committee, 89th Cong. 1st Sess., (1965) 32

---

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Murtagh, The Derelicts of Skid Row, Atlantic Monthly, March, 1962 33

2 WIGMORE, EVIDENCE 432, 483n.1 (3d ed. 1940) . . . 36,37

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 19,762

JAMES R. GOODMAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From Judgment of the United States
District Court for the District of Columbia

JURISDICTIONAL STATEMENT

James R. Goodman, appellant, was tried and convicted in the United States District Court of the offense of unauthorized use of a motor vehicle in violation of 22 D.C.C. §2204. Sentence was imposed on October 11, 1965. Appellant's Affidavit in Support of Application To Proceed on Appeal Without Prepayment of Costs was filed on October 11, 1965 and was granted on October 13, 1965. The jurisdiction of this court is invoked under 28 U.S.C. §1291.

STATEMENT OF THE CASE

This is an appeal from a conviction for unauthorized use of a 1960 Volkswagen belonging to George C. Duval, which was removed from a parking garage on April 16, 1965, without permission of the owner or garage attendant. (Transcript, pp. 22 - 26).

Five days later, on April 21, 1965, between 2:30 and 3:00 a.m., the defendant was arrested for being drunk in public and subsequently was charged with unauthorized use of the car. Defendant was arrested by Private Norman L. Garrison of the Metropolitan Police Department in front of 1013 Massachusetts Avenue, N.E. (Transcript, pp. 6 - 10).

Without a warrant, Private Garrison arrested defendant solely on the basis of (1) his observation that defendant was "unsteady on his feet" as he walked down the sidewalk, and (2) his detecting a strong odor of alcohol on defendant's breath. (Transcript, Motion to Suppress, pp. 11-12, 16 - 17). Private Garrison testified that he neither observed defendant disturbing the peace of any person nor drinking or carrying a bottle of alcohol. (Id. at 17.)

According to Private Garrison's testimony, before

defendant was arrested, he was questioned by Garrison's partner, Police Sergeant Cubbage. Garrison testified that, after he arrested defendant, he interrogated him further, then searched him, finding a Volkswagen key. Garrison testified that this key fitted the car subsequently found to belong to George C. Duval and taken from a parking garage without permission on April 16. (Transcript, Motion to Suppress, p. 12, Transcript, pp. 8 - 9). Garrison did not state that defendant made any admission during his threshold interrogation at the scene of the arrest.

Before trial, defendant moved to suppress all evidence obtained as the result of his arrest on the ground that there was no statute in force in the District of Columbia outlawing public intoxication unless coupled wihh illegal drinking or disturbing the peace. This motion was denied and renewed at trial (Transcript, pp. 4 - 5).

At trial Private Garrison testified that, shortly before arresting defendant, he had seen a Volkswagen proceed east on Massachusetts Avenue, cross the intersection at Tenth Street, N.E., then back past the intersection, stop, and turn right onto 10th Street, where it proceeded halfway down the block and parked. (Tr. pp. 7, 18). According to Private Garrison's testimony, he was able to observe

the driver of this car for a period of 5 to 7 seconds at a distance varying from 40 to 150 feet after the car turned south onto Tenth Street and, from that observation, he was able to identify the driver as the defendant when he saw the defendant together with another man on the Massachusetts Avenue sidewalk. These observations allegedly were made between 2:30 and 3:00 a.m. (Transcript, pp. 7 - 16).

Defendant testified that he had never driven the Volkswagen in issue, or any other Volkswagen, and that he had arrived at the scene of the arrest in a taxicab. (Transcript, pp. 30 - 31).

Counsel for defendant sought to call as a witness a special investigator to impeach the testimony of Private Garrison by testifying that it would be impossible for a man of perfect vision to see what Private Garrison said he saw. (Transcript, p.27). Counsel made a proffer of evidence to the effect that the conditions under which the special investigator made his observations were "identical" to the conditions under which Private Garrison made his observations (Ibid.). A proffer also was made that the special investigator's vision was good. (Transcript, pp. 46 - 47). Yet, the trial court excluded this impeachment testimony, stating,

"Unless you can establish to the last iota the similar conditions, I don't think it is admissible." (Transcript, p. 46.)

Private Garrison also testified that, at approximately 4:00 a.m., or more than an hour after defendant's arrest, defendant had a "conversation" with the police officer and "admitted that he had been in the car but he was not driving the car." Defendant objected to this testimony and moved for a mistrial on the ground that defendant's admission was made during a period of unnecessary delay between arrest and arraignment. (Transcript, p. 10).

Sometime on April 21, defendant was advised of his rights by Judge Barlow of the D.C. Court of General Sessions, but the record does not indicate the hour of this arraignment. (Complaint.). Judicial notice can be taken of the fact that, ordinarily, judges are not available in the District of Columbia to advise defendants of their rights before 10:00 a.m. Moreover, in opposing defendant's Mallory rule objection, the prosecutor failed to claim that defendant had been advised of his rights, either by the police or by a judicial officer, before he made the challenged statement. The prosecutor's only proffered justification for use of the statement was that it was

"exculpatory." (Transcript, p. 10). There was no other evidence placing defendant in the car as a passenger.

Yet, at the prosecution's request (Transcript, p. 57) and over defendant's objection, (Transcript, pp. 63 - 69), the Court instructed the jury as follows:

> Now, being a passenger in a stolen car, if the defendant knew it was stolen, constitutes an unauthorized use of the vehicle. (Transcript, p. 64).

This instruction was supported in the evidence only by the admission of defendant, set out above. The indictment did not charge defendant with being a passenger in a stolen car.

At the conclusion of defendant's trial, which took place on August 6, 1965, the jury found him guilty as charged. On October 11, 1965, the District Court sentenced defendant to jail for 20 months to 5 years.

CONSTITUTIONAL PROVISION, STATUTES, AND RULE INVOLVED

United States Constitution, Amendment V

> No person shall . . . be deprived of . . . liberty . . . without due process of law . . . .

District of Columbia Code (1961)

Section 4-140:

> The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress . . . but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law.

Section 25-128:

> Set out in full below at pages 18-19.

Federal Rules of Criminal Procedure, Rule 5(a):

> [A]ny person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States.

Federal Rules of Criminal Procedure, Rule 30:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, ...

STATEMENT OF POINTS

1. The District Court erred in admitting, over defendant's objection, evidence obtained as a result of defendant's arrest. which was illegal because it was based solely on defendant's being drunk in public, which conduct, standing alone, does not constitute a criminal offense in the District of Columbia.

With respect to point 1, appellant desires the Court to read the following: Motion to Suppress; Transcript, Motion to Suppress, pp. 5-6, 10-13, 15-17, 21-30; Transcript of Trial, pp. 4-5, 6-10, 55.

2. The District Court erred in excluding proffered defense testimony of a carefully controlled experiment tending to prove that the key Government witness could not have seen what he testified he saw when he allegedly observed defendant driving the stolen car.

With respect to point 2, appellant desires the Court to read the following: Transcript of Trial, pp. 5-19, 27-28, 31-32, 46-47.

3. The District Court erred in admitting, over defendant's objection, police testimony that, one hour after his arrest, defendant stated he had been in the stolen car.

With respect to point 3, appellant desires the Court to read the following:

Transcript, Motion to Suppress, pp. 11-12, 15-16; Transcript of Trial, pp. 6-10, 57, 64, 68-69.

4. The District Court erred in instructing the jury, over defendant's objection, that they could find defendant guilty if they found he was passenger in the stolen car, knowing it to be stolen, when this issue was neither raised by the indictment nor supported by evidence.

With respect to point 4, appellant desires the Court to read the following: Indictment; Transcript of Trial, pp. 7-19, 31-32, 50-52, 57, 64, 68-69.

SUMMARY OF ARGUMENT

I

A. Crucial government evidence admitted at trial arose from an illegal arrest. The arrest, without a warrant, was illegal because it was based on conduct not constituting a criminal offense in the District of Columbia.

Defendant was arrested for being drunk in public, but the arresting officer testified that defendant was neither disturbing the peace of any person nor was he observed drinking in a prohibited place or under prohibited circumstances. (Transcript, Motion to Suppress , p. 17).

Section 25-128 of the D.C. Code (1961) is the only criminal statute relating to drunkenness in the District of Columbia. Section 25-128 cannot permissibly be read as making drunk in public, without more, a crime; drunk in public is only one of several elements essential to a violation of the statute; the others being, in the alternative, disturbing the peace or drinking in a prohibited place or under prohibited circumstances.

This reading of Section 25-128 is required by the word "such" which modifies the word "person" in the first clause of the second sentence of the statute.

"Such" limits the included class of persons by reference back to the first sentence of the statute which specifies where drinking is allowable and prohibits drinking under specified circumstances. Any other reading of the statute, such as that of the District Court, distorts its plain meaning and violates the canon of strict construction of penal statutes.

B. The construction of the Section 25-128 urged by defendant avoids doubts as to its constitutionality which inhere in the reading adopted by the District Court. Drunk in public, without more, is not conduct which impinges upon the public welfare. Accordingly, it cannot be made the subject of criminal prohibitions without raising grave questions of substantive due process.

C. Defendant's reading of Section 25-128 will not jeopardize public order and safety in the District of Columbia. Few jurisdictions outlaw public intoxication, without more; most require that public intoxication be coupled with a breach of the peace before being actionable. The exceptionally large number of arrests for public drunkenness in the District of Columbia is contrary to the public interest because it unnecessarily interferes with the efficient operation of law enforcement agencies.

II

The District Court erroneously refused to permit defendant to impeach vital prosecution testimony by demonstrating its impossibility. Defendant proffered evidence of an experiment tending to prove that the arresting officer could not have seen what he said he saw. The District Court excluded defense testimony regarding this experiment and even failed to afford defendant an opportunity to lay an evidentiary foundation of similarity of circumstances.

It is settled in this and other jurisdictions that evidence of experiments is admissible provided only that the circumstances are similar. E.g,, Goodall v. United States, 86 U.S. App. D.C. 148, 180 F.2d 397, cert. denied, 339 U.S. 987 (1950). This rule extends to experiments tending to impeach eyewitness identification by showing its impossibility. In two cases on all fours with the case at bar, convictions were reversed because of the exclusion of experiments impeaching eyewitness identification. Richardson v. State, 90 Md. 108, 44 Atl. 999 (1899); State v. Hedgepeth, 230 N.C. 33, 51 S.E.2d 914 (1949).

The exclusion of evidence concerning defendant's experiment cannot possibly be justified on the ground that

the circumstances were dissimilar since the District Court did not even admit testimony on the threshold question of similarity. Without such evidence, defendant's offer to prove that the circumstances were "identical" is binding and requires a new trial.

Moreover, the test of absolute similarity announced by the District Court is erroneous. The authorities show that reasonable or substantial similarity of circumstances is enough to warrant admission of the evidence, leaving any difference in details to control its weight with the jury.

II

The trial court erred in overruling defendant's Mallory rule objection to police testimony that, one hour after arrest, defendant stated that he had been in the stolen car.

Assuming arguendo that public intoxication, without more, is a criminal offense, the police officer had ample probable cause for his arrest of defendant without a warrant. There was no need for further interrogation before booking. Yet, according to prosecution testimony, defendant was taken to headquarters, where inquiries were made to determine whether the car in issue had been stolen,

before defendant made the challenged admission during a "conversation" with the arresting officer.

Use of defendant's statement cannot be justified on the ground that it was a threshold statement. Greenwell v. United States, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964); Spriggs v. United States, 118 U.S. App. D.C. 248, 335 F.2d 283 (1964). Nor did the Government show that defendant made the admission voluntarily after having been advised of his right to remain silent. See Alston v. United States, U.S. App. D.C. , 348 F.2d 72 (1965).

The prosecution's only proffered justification for use of the challenged statement, namely, that it was exculpatory, will not withstand analysis. At the prosecution's request, over defendant's objection (see point IV below), the court instructed the jury that being a passenger in a stolen car with guilty knowledge constitutes a violation of the unauthorized use statute. This instruction appears to be a correct statement of the law, but whether correct or not, it rendered defendant's admission highly prejudicial.

IV

The court's passenger instruction, described above, erroneously permitted the jury to predicate a guilty verdict

on an issue neither raised by the indictment nor supported by evidence.

The indictment failed to put defendant on notice to be prepared to meet evidence that he had ridden as a passenger in the stolen car. The prosecution's entire case was devoted to showing only that defendant had driven the car; two police eyewitnesses testified to this effect.

The only evidence that defendant was a passenger in the car was one police officer's testimony that defendant had made a statement to that effect, and that testimony should have been excluded for the reasons outlined under Point III above. Even if defendant's statement should be deemed admissible, it cannot serve to support the challenged instruction because it could only be admitted as the exculpatory statement the prosecution claimed it to be.

It is error to instruct a jury on an issue not charged in the indictment and not supported by evidence. E.g., Sinclair v. United States, 49 App. D.C. 351, 265 Fed 991 (1920). Such an instruction requires reversal unless it is conclusively shown that it could not have prejudiced defendant. Kotteakos v. United States, 328 U.S. 750 (1946). Here, the instruction was clearly

prejudicial because it permitted the jury to predicate a guilty verdict entirely on defendant's admission.

ARGUMENT

I

COURT ADMITTED EVIDENCE OBTAINED FROM ARREST THAT WAS ILLEGAL BECAUSE IT WAS BASED ON NON-CRIMINAL CONDUCT, NAMELY, DRUNK IN PUBLIC

At defendant's trial, key prosecution witness, Private Garrison, testified that he arrested defendant for drunk in public, searched him, and found keys to the stolen car.[1/] (Transcript, pp. 8-9). Prior to trial, defendant moved for suppression of all evidence obtained as an incident to his arrest on the ground that his arrest was illegal.[2/] The denial of this motion, and the admission of crucial evidence obtained incident to defendant's arrest requires a new trial.

Defendant's arrest was illegal because it was based solely on conduct which did not constitute a criminal offense under D. C. law. Defendant was arrested simply

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1/ The prosecutor produced these keys at trial, showed them to the jury, and sought to introduce them into evidence, but the trial court ruled them out as unnecessary. (Transcript, p. 55). Nevertheless, their production and exhibition caused defendant as much prejudice as would their actual introduction into evidence.

2/ This motion was renewed at trial. (Transcript, p. 4-5).

for being drunk in public, but being "drunk in public", without more, is not a criminal offense in the District of Columbia.

The only statute relating to intoxication as a crime in the District of Columbia is Section 25-128 of the D. C. Code (1961). That statute makes the act of being drunk in public only one of several elements necessary to constitute a crime. In addition to the element of being drunk in public, the statute also requires either the element of disturbing the peace or the element of drinking in a prohibited place or under prohibited circumstances. The record is clear that neither of these other essential elements was present to support defendant's arrest, which accordingly, was illegal.

Section 25-128 of the D. C. Code reads as follows:

> (a) No person shall in the District of Columbia drink any alcoholic beverage in any street, alley, park, or parking; or in any vehicle in or upon the same; or in or upon any premises where food, non-alcoholic beverages, or entertainment are sold or provided for compensation not licensed under this chapter; or in any place to which the public is invited for which a license has not been issued hereunder permitting the sale and consumption of such alcoholic beverage upon such premises except premises licensed under Section 25-111 (1); or in any place to which the public is invited (for which a license under this

> chapter has been issued) at a time when the sale of such alcoholic beverages on the premieses is prohibited by this chapter or by the regulations promulgated thereunder, or in any place for which a license under Section 25-111(1) has been issued at a time when the consumption of such alcoholic beverages on the premises is prohibited by regulations promulgated under this chapter. No such 3/ person shall be drunk or intoxicated in any street, alley, park, or parking; or in any vehicle in or upon the same or in any place to which the public is invited, or at any public gathering and no person anywhere shall be drunk or intoxicated and disturb the peace of any person. (Emphasis added.)

Under this statute, drunk in public is not a criminal offense unless it is coupled either with disturbing the peace or drinking in a prohibited place or under prohibited circumstances.

A. The words of the statute cannot grammatically be read to make drunk in public a crime.

Section 25-128 defines three distinct offenses:

(1) Consumption of alcoholic beverages in prohibited places or under prohibited circumstances. (First sentence.)

(2) Drunk in public coupled with any element

3/ The word "such" was added to the second sentence of Section 25-128 by a 1953 amendment which also added certain language to the first sentence not pertinent to the case at bar. Act of June 29, 1953, 67 Stat. 104.

defined by the first sentence. (Second sentence through "public gathering".)

(3) Intoxication coupled with disturbing the peace. (Remainder of second sentence.)

The word "such" in the first clause of the second sentence of Section 25-128[4/] makes it grammatically and legally impermissible to read the statute as prohibiting drunk in public, without more. To read the statute as outlawing mere public intoxication in the District of Columbia requires syntactical acrobatics that are barred by the rules of construction for penal statutes, such as Section 25-128, which must be read strictly so as to accord sensible meaning to each word.

> "Before one may be punished, it must appear that his case is plainly within the statute; there are no constructive offenses." Nelson v. United States, 109 U.S. App. D.C. 392, 395, 288 F.2d 376, 379 (1961), quoting United States v. Resnick, 299 U.S. 207, 210 (1936).

"Such" is generally used to modify an accompanying noun by reference back to a class defined by foregoing language considered in its entirety. In Section 25-128,

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4/ Added by the 1953 amendment. See n. 3, supra.

the only class defined by the first sentence is the class of persons consuming alcoholic beverages in prohibited places or under prohibited circumstances, and it is this class to which "such" refers under any ordinary reading.

In denying defendant's motion to suppress evidence, the court below departed from the ordinary meaning of the word "such" and read it as referring only to the words "in the District of Columbia" at the beginning of the preceding sentence. This construction of the statute appears particularly distorted in face of the use of the words "in the District of Columbia" not as modifiers of the word "person" but as specifying a place where any person must not commit the defined acts. The class limitation in the first sentence of Section 25-128 is not to be found in the words "in the District of Columbia" but in the following 158 words prohibiting drinking in specified places or under specified circumstances. The District Court's tightjacket construction of "such" cannot stand in face of the universally accepted rules for construing penal statutes strictly in favor of the defendant.

The United States Supreme Court and the Court of Appeals of New York both have construed the word "such" in a statute; their constructions are consistent with each

other but incompatible with the District Court's holding in the case at bar.

United States v. Bowen, 100 U.S. 508 (1879), concerned the following statutory provision:

> The fact that one to whom a pension has been granted, for wounds or disability received in the military service, has not contributed to the funds of the Soldiers' Home shall not preclude him from admission thereto. But all such pensioners shall surrender their pensions to the Soldiers' Home during the time they remain there and voluntarily receive its benefits. (100 U.S. at 511). (Emphasis added.)

Bowen, the recipient of an invalid pension, had contributed to the funds of the Soldiers' Home.

The court stated:

> If the qualifying word such is restricted to pensioners described in the sentence which immediately precedes it, then Bowen does not belong to that class, and is not bound to surrender his pension. There is no other class of pensioners described in that section to whom the word such can refer than those who have not contributed to the funds of the Home . . . .
>
> The word, however, as there used, has an appropriate reference to the class of pensioners who have not contributed to the funds of the institution, and no sound canon of construction will authorize us to disregard it, when to do so changes very materially the meaning of the section. (100 U.S. at 512-13).

If the Supreme Court in the Bowen case had construed "such" in the same manner as the District Court did here,

it would have limited "such" to refer to anyone to whom a pension had been granted and would have ignored the other intervening language. Instead, the Court gave "such" its generally accepted meaning of a reference to the class limitation of the preceding language. This is the meaning which must be accorded to "such" in Section 25-128. In In re Clonan's Estate, 28 N.Y.S.2d 88 (1941), the New York Court of Appeals interpreted a New York public welfare statute which provided that:

> A public welfare official may bring action . . . against the estate or the executors, administrators and successors in interest of a person who dies leaving real or personal property, if such person . . . received relief and care during the preceding ten years, and shall be entitled to recover up to the value of such property the cost of such relief . . . . (28 N.Y.S.2d at 90). (Emphasis added.)

In interpretating the meaning of the phrase "such property", the court stated:

> The extent of recovery can have no reference except to the property of which the person receiving relief died, seized or possessed. "Such property" must have reference back and apply to a preceding specification in the same section . . . . The word "such" when used in a contract or statute, must, in order to be intelligible, refer to some antecedent, and will generally be construed to refer to the last antecedent in the context, unless some compelling reason appears why it should not be so construed. (28 N.Y.S.2d at 91).

To read "such" as narrowly as did the court below is to read it entirely out of the statute. The D. C. Code, in which Section 25-128 appears, can apply only to crimes committed in the District of Columbia, and accordingly specific statutory language of limitation to the District is superfluous. For this reason, no such limiting language appears in most of the criminal provisions of the D. C. Code, including the sections defining assault (22-501), bribery (22-701), embezzlement (22-1202), false pretenses (22-1301), forgery (22-1401), housebreaking (22-1801), larceny (22-2101), unauthorized use of vehicles (22-2204), receiving stolen goods (22-2205), libel (22-2301), false charges of unchastity (22-2304), murder (22-2401), perjury (22-2501), rape (22-2801), robbery (22-2901), seduction (22-3001), forcible entry and detainer (22-3101), unlawful entry (22-3102), grave robbery (22-3103), and gift enterprise (22-3401).

Although the word "such" has appeared in Section 25-128 since 1953, counsel has found no judicial decision construing it. As the District Court noted (Transcript of Motion to Suppress, pp. 23-24), the issue of whether Section 25-128 outlaws drunk in public, without more, was neither raised nor decided in Easter v. District of

Columbia, 209 A.2d 625 (D.C. Ct. App. 1965), appeal granted, October 27, 1965, No. 19,365, D.C. Cir. Nor is the issue raised in appellant's brief filed in this Court in the Easter case on November 22, 1965. Accordingly, it would appear that the correct construction of Section 25-128 is a matter of first impression and should be decided on the basis of the statute's clear language, which appellant urges does not outlaw drunk in public, without more.

B. Section 25-128 should be read as appellant urges to preserve its constitutionality.

Reading Section 25-128 of the District of Columbia Code as making a crime of being drunk in public, without more, raises grave doubts as to its constitutionality. Defendant's reading of the statute avoids this constitutional problem.

While the powers of government to enact legislation for the public health, safety and morals are broad, they are not without limitation. A statute prohibiting drunkenness alone, with no social danger, is not within the legitimate scope of legislative power.

A statute may not deprive an individual of his liberty unless such a deprivation is required for the common welfare. This is a principle rooted in English and American political theory.

> The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature and ends of legislative power will limit the exercise of it . . . . An act of the Legislature (for I cannot call it a law) contrary to the great first principals of the social compact, cannot be considered a rightful exercise of legislative authority. Calder v. Bull, 3 Dallas (U.S.) 386, 388 (1798). (Emphasis added.)

This principle is implemented by the "due process" clause of the Federal Constitution, which limits the class of actions which can properly be made the object of a criminal statute to acts which impinge on the public welfare. An explanation of this concept of "substantive due process" was recently expounded by Mr. Justice Harlan as follows:

> Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three . . . . Thus the guarantees of due process, though having their roots in Magna Carta's "per legem terrae" and considered as procedural safeguards "against executive usurpation and tyranny," become bulwarks also against arbitrary legislation. Poe v. Ullman, 367 U.S. 497, 541 (1961). (Harlan, J. dissenting.)

The judiciary has struck down, as unconstitutional, statutes which bear no substantial relationship to the

common welfare. In a decision by the United States Supreme Court, Meyer v. Nebraska, 262 U.S. 390 (1923), a statute prohibiting the teaching of foreign languages in schools to students who had not completed the eighth grade was declared unconstitutional. The case involved the conviction of a teacher who had taught the German language to a ten year old parochial school student. The lower court had upheld the statute, finding a clear "salutory purpose" in the legislative desire to assimilate young people of foreign origin into the American culture. However, the Supreme Court held on appeal that:

> Mere knowledge of the German language cannot reasonably be regarded as harmful. . . .
>
> * * * *
>
> No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary, and without reasonable relation to any end within the competency of the state. (262 U.S. at 400, 403).

Similarly, a Virginia statute requiring the licensing of photographers,[5/] and a Maryland statute creating

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5/ Moore v. Sutton, 185 Va. 481, 39 S.E.2d 348 (1946)

a board to license paperhangers were declared unconstitutional,[6/] because they bore no relation to the public good. These cases are in point because they demonstrate that the legislature cannot regulate conduct, much less outlaw it unless the regulation bears a direct relationship to the public welfare.

The defendant in this proceeding did no more than to appear on the street with a strong odor of alcohol on his breath and an unsteady gait. He neither disturbed nor offended anyone by his conduct. His presence on the street interfered in no way with the activities of other pedestrians. A statute which would prohibit an intoxicated person from appearing in public is arbitrary, and bears no relation to the public welfare.

Nor can a prohibition against public intoxication, without more, be justified on the ground that experience shows that a drunk is more likely than a sober person to disturb the peace or otherwise behave in an antisocial manner. The legislature's power to enact criminal statutes extends only to acts that are, in themselves, antisocial,

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6/ Dasch v. Jackson, 170 Md. 251, 183 Atl. 534 (1936).

not to states or conditions that simply increase the danger of future antisocial behavior.

We do not ask this Court to strike down, as unconstitutional, Section 25-128 of the D.C. Code. Rather, we urge this Court to read Section 25-128 so as to avoid a statutory construction which is of doubtful constitutionality.

> The Supreme Court has repeatedly warned "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." [Citing Crowell v. Benson, 285 U.S. 22, 62 (1932); United States v. Rumely, 345 U.S. 41, 45 (1953); United States v. C.I.O., 335 U.S. 106 (1948); Brandeis, J. concurring in Ashwander v. T.V.A., 297 U.S. 288, 341, 348 (1936); and cases cited.] Indeed, the Court has stated that words may be strained "in the candid service of avoiding a serious constitutional doubt." [Citing United States v. Rumely, supra.] Here there is no need to strain words. It requires neither torturing of language nor disregard of a clear legislative policy [citing Shapiro v. United States, 335 U.S. 1, 31 (1948).] to avoid the constitutional question advanced by the witness. Indeed, to reach the constitutional issue would require straining of language. In such circumstances the court's duty is plainly to avoid the constitutional question. Ullmann v. United States, 350 U.S. 422, 433 (1956) (adopting the language of the District Court, 128 F. Supp. 617, 627-28).

C. Reading Section 25-128 as defendant urges will not hamper proper law enforcement.

Adoption of appellant's reading of

§ 25-128 will not hamper the efforts of the Metropolitan Police to preserve public order and safety in the District of Columbia. The statute will still permit arrests of intoxicated persons who disturb the peace, and not interfere with enforcement of other local regulations relating to intoxicating beverages.

Public intoxication has been a subject of legislation in most states, yet very few state statutes make public drunkenness, standing alone, a crime.

> Drunkenness is not per se a subject of legislative prohibition or control, except where the circumstances attending it render it annoying or disturbing to others, as where it amounts to a breach of the peace, so that legislation prohibiting drunkenness in public places and within sight of such places prescribes no rule of sobriety to be observed by persons within their doors, or by their guests so situated, and does not apply to their conduct unless it obtrudes itself offensively on the attention of others. 30 AM. JUR., Intoxocating Liquors § 37 (1958).

In Wyoming, for example, the arrest of a person on the ground of drunkenness was held invalid in that drunkenness was neither a common law crime nor a crime by any Wyoming statute. The Sheriff's second argument in justification of the arrest, that the arrest was for the purpose of "preserving the peace," also failed. The

court said:

> None of the cases could be authority for holding that a breach of the peace is threatened by mere drunkenness. State v. Munger, 43 Wyo, 404, 4 P.2d 1094 (1931).

North Carolina has adopted a similar standard.

> Private drunkenness is no offense by our municipal laws. It becomes so by being open and exposed to public view, to that extent that it thereby becomes a nuisance commune nocumentun . . . . Moser v. Fulk, 237 N.C. 302, 74 S.E. 2d 729 (1953), citing State v. Waller, 7 N.C. 229, 230 (1819)

Georgia, too, prohibits only drunkenness which is made manifest by boisterous conduct or profane language. The Georgia Court of Appeals reversed a conviction under the Georgia statute of a man who was drunk but fast asleep. The court said:

> The purpose of the statute is to protect the public streets and highways, and private residences, not so much from the presence of the drunkard, as from the conduct of the drunkard as described in the act. Ramey v. State, 40 Ga. App. 658, 151 S.E. 55 (1929).

The unusually large number of arrests for drunkenness in the District of Columbia[7/] places an

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7/ Comparative figures on annual arrests for drunkenness by representative American cities were furnished to counsel for appellant by the Federal Bureau of Investigation and are appended hereto in Appendix A and B. Of the major cities for which statistice are available, Washington's
(footnote continued on next page)

unwarranted burden on the judiciary, and seriously hampers the operation of the courts. United States Attorney General Nicholas deB. Katzenbach,testifying on the Law Enforcement Assistance Act of 1965 before an ad hoc subcommittee of the Senate Judiciary Committee, stated that:

> We presently burden our entire law enforcement system with activities which quite possibly should be handled in other ways. For example, of the approximately six million arrests in the United States in 1964, fully one-third were for drunkenness. The resulting crowding in courts and prisons affects the efficiency of the entire criminal process. Better ways to handle drunks than throwing them in jail should be considered. Some foreign countries now use "sobering-up stations" instead of jails to handle drunks. Related social agencies might be used to keep them separate from the criminal process. 8/

This court should follow the lead taken by the New York courts. A New York statute in force in the 1930's made public intoxication an offense. In 1935, in the course of a routine proceeding against a man who had been drunk on a city sidewalk, a city magistrate held

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7/ (footnote continued from page 31) rate of arrests per 100,000 population is almost double that of any other city and exceeds by more than tenfold the rate in Detroit.

8/ Hearings Before A Subcommittee of the Senate Judiciary Committee, 39th Cong., 1st Sess., at 6 (1965).

that the police must allege and prove that a person was drunk so as to tend to cause a breach of the peace. Subsequently, the Chief Magistrate directed that all printed forms relating to this offense be destroyed. The statute has now been taken off the books.9/

9/ Murtagh, The Derelicts of Skid Row, Atlantic Monthly, March, 1962.

II

COURT ERRONEOUSLY EXCLUDED DEFENSE TESTIMONY REGARDING EXPERIMENT TO IMPEACH IDENTIFICATION OF DEFENDANT BY KEY GOVERNMENT WITNESS

The crux of the prosecution's case was Private Garrison's testimony that he saw and identified defendant driving the stolen Volkswagen, an identification that directly contradicted defendant's testimony that he had never driven (and indeed, prior to his arrest, had never seen) the stolen car. (Transcript, pp. 7, 31). Yet, the trial court refused to admit evidence of an experiment proffered by the defendant to demonstrate the physical impossibility of Private Garrison's alleged observations. (Transcript, p. 47). This refusal requires a new trial.

Private Garrison's testimony was detailed as to the circumstances of his observations and precise as to his identification of defendant. He testified that, between 2:30 and 3:00 a.m., on the morning of April 21, 1965, "I was approximately 40 to 50 feet from the car and I observed the defendant, Mr. Goodman, operating the car." (Transcript, p. 7). Garrison stated that his observations lasted "approximately five to seven seconds"; that he observed the defendant "approximately between his elbows and

his shoulders, in between, up to the top of his head," and that he noted that the defendant was wearing a multi-colored sweater. (Transcript, pp. 14-15). Garrison testified that he could "make out" the defendant "in the car from the time it passed me at 10th and Massachusetts until he parked it in the unit block of 10th Street" and that he could see the defendant in the car at the time he was parking it, at which point Garrison was 100 to 150 feet away from the car. (Transcript, p. 18).

To impeach this crucial testimony, defendant sought to introduce evidence that no person possibly could have made such observations, but the trial court excluded defendant's evidence. On a night subsequent to defendant's arrest, the two counsel for defendant and an experienced investigator from the Legal Aid Agency, Robert J. Reed, went to the scene of the arrest. There one counsel drove and the other rode, in a Volkswagen, over the same ground, and in the same manner, that Garrison testified that the defendant had driven. Detective Reed stood just where Garrison testified he stood and observed whether or not it would be possible to make the observations Garrison said he made. The trial court refused to permit Reed to testify as to his observations.

Defendant's offer of proof was two-fold:

(1) Reed would have testified that it would be physically impossible for Private Garrison to have seen what he said he saw.

(2) The circumstances attending Reed's observations were "identical" to the circumstances attending Garrison's observations. (Transcript, pp. 27-28, 46-47).

It is well established and universally recognized that testimony regarding an experiment conducted outside the court is admissible provided that the circumstances of the experiment are similar to the circumstances of the event in issue. Wigmore criticizes reluctance to use experimental evidence as the product of "an ignorance of precedents and a bigoted fear of everything not technical," or an unwarranted "disinclination to accept what does not come in the accustomed shapes of certified copies, sealed instruments, and sworn depositions." 2 WIGMORE, EVIDENCE 432 (3d Ed. 1940). This Court has approved use of experimental evidence where conditions are similar. Goodall v. United States, 86 U.S. App. D.C. 148, 180 F.2d 397, cert. denied, 339 U.S. 987 (1950) (ballistics tests); Morton v. United States, 79 U.S. App. D.C. 329, 147 F.2d 28,cert. denied, 324 U.S. 875 (1945) (blood tests, soil tests).

It is clear that the rule permitting evidence of experiments extends to tests of visual identification ability and particularly to experiments showing the impossibility of making identification under given circumstances. See cases collected at 2 WIGMORE, op. cit. supra, 483 n.1. Thus, in Richardson v. State, 90 Md. 109, 44 Atl. 999 (1899), a case on all fours with the present case, the Maryland Court of Appeals reversed a criminal conviction because the trial court refused to admit testimony of an experiment tending to impeach the prosecution's eyewitnesses. In the Richardson case, two prosecution witnesses testified that, while they were sitting on a bench at a railroad station, they heard a pistol shot and five minutes later, saw a person run down the road. They both testified that, as the runner passed under a nearby street lamp, they were able to identify him as the defendant. To impeach this testimony, defendant proffered testimony of an experiment whereby four different young men sat on the same bench some twenty-five days later and were unable to identify various persons passing under the same street lamp. The Court of Appeals reversed the trial court's exclusion of testimony regarding this experiment and remanded for a new trial, relying on Smith v. State, 2 Ohio St. 511

(1853), and quoting the Smith case explanation of the rule with approval:

> Direct contradiction by eyewitnesses was, therefore, impossible, and would, perhaps, be equally impossible in a large majority of cases. Unless, then, proof of experiments is receivable, a man is very much at the mercy of another who swears against him, and perjury, or mistake, however great, instead of incurring punishment or being rectified, may answer to produce conviction. It was also argued that the state cannot come prepared to meet proof of facts that are not part of the res gestae. But the credibility of testimony is always in issue, and the state must come prepared to maintain the credibility of hers. Finally, it is said that, notwithstanding the result of the experiments, it is possible that Holcombe [the prosecution's eyewitness] saw what he said he did. Granted; but what of that? It was not indispensable to the defense to prove the utter impossibility of his statement. Evidence that tended to show its improbability was competent, and such evidence, if it did not convince, might at least have raised a reasonable doubt in the minds of the jury. (Quoted at 44 Atl. 1002).

In State v. Hedgepeth, 230 N.C. 33, 51 S.E.2d 914 (1949), the North Carolina Supreme Court reversed a criminal conviction because the trial court had excluded testimony identical in all essential respects to that rejected in the case at bar. In the Hedgepeth case a prosecution eyewitness testified that she had seen an assault through a certain window. The trial court then rejected the testimony of three witnesses who, on the day before trial, had

stood at varying distances outside the window in question and had been unable to distinguish objects within. Reversing, the North Carolina Supreme Court held:

> Apparently this testimony was excluded for the reason the witnesses could not say that their experiments were made under conditions substantially similar to those that existed on the day of the alleged crime. But this was not a prerequisite. The defendant had already shown, through examination of witnesses for the State, that 31 August was a hazy cloudy day and the sky was overcast with clouds. [Defendant's offer of proof was to the effect that the day of his experiment was cloudy and drizzly with an overcast sky.] The condition of the window was the same. Thus it was made to appear that the experiments were made under substantially similar circumstances. State v. Phillips, 228 N.C. 595, 46 S.E.2d 720 (1948). The one and only "variation" rests in the testimony of Mrs. Bowden: that while a hurricane was approaching, the sky was clear on 31 August. In the light of all the other testimony, this was not sufficient to render the tendered testimony incompetent. State v. Phillips, supra. (51 S.E.2d at 915).

In the case at bar, the arbitrariness of the trial court's action was aggravated by its failure even to permit Detective Reed to testify as to the threshold issue of similarity of circumstances. On the record as it stands, the trial court had (and this court has) no alternative but to honor defendant's clear offer of proof that the circumstances of the experiment were "identical" to the

circumstances of Private Garrison's identification of defendant. (Transcript, p. 27). A similar arbitrary refusal to permit counsel to lay a foundation for evidence of an experiment was held grounds for a new trial in Amsbary v. Grays Harbor Ry. & Light Co., 78 Wash. 379, 139 Pac. 46 (1914), where the Supreme Court of Washington said:

> It seems quite clear to us that counsel for appellant were entitled to lay the foundation for offering testimony touching the result of the experiment. Yet this is the very thing they were, by the ruling of the court, prevented from doing, which ruling seems to have no other foundation than the court's assumption that there was, in fact, no sufficient similarity of circumstances attending the accident and the experiment. The real error of the court lies in the fact that counsel for appellant were not permitted to introduce evidence touching this preliminary question; while the court, if the theory of counsel for respondent be correct, was apparently deciding the question of counsel's right to prove the result of the experiment. The court was not yet called upon to rule upon the admissibility of evidence touching the result of the experiment, and it seems clear that the offer of proof touching the preliminary question of similarity of conditions was material and relevant to that question. We are of the opinion that the ruling of the court was clearly erroneous in so far as it included proof of the preliminary question of similarity of conditions. In its final analysis, this would seem to be decisive of the real question here presented; but, in view of the fact that a new trial must follow because of this error, we deem it

proper to make some further observations. (139 Pac. at 48).

Not only did the court below err in excluding evidence as to similarity of circumstances, it apparently proceeded from an erroneously strict standard of similarity. In rejecting defendant's evidence, the court said, "Unless you can establish to the last iota the similar conditions, I don't think it is admissible." (Transcript, p. 46). The proper rule for admission of testimony regarding experiments is not absolute identity of circumstances but rather reasonable or substantial similarity. Lever Bros. Co. v. Atlas Assur. Co., 131 F.2d 770 (7th Cir. 1942); Thomas v. Central Greyhound Lines, Inc., 6 A.D.2d 649, 180 N.Y.S.2d 461 (1958); Leonard v. Henderson, 118 Vt. 29, 99 A.2d 698 (1953); State v. Hedgepeth, supra. Similarity of circumstances need not be established to the last iota, as the trial judge here said; rather, similarity is a relative question, as the Seventh Circuit explained in the Lever Bros. case:

> "Substantial similarity," to accept defendants' phraseology, is a relative term, and in its measurement the trial court has some discretion. There are no hard or fast rules as to what degree of similarity there must be to make the evidence admissible. If there is no similarity of conditions, then the evidence

would be inadmissible. If there is some similarity of conditions, the weight of that evidence would be in proportion to the evidence of similarity, the greater weight to be given where there is greater similarity and the lesser weight where the similarity is less. But if there are valid points of similarity, . . . we think the evidence is admissible, and its weight was of course for the jury under all circumstances. (131 F.2d 777).

III

COURT ERRONEOUSLY ADMITTED POLICE TESTIMONY THAT DEFENDANT MADE AN INCRIMINATING STATEMENT DURING A PERIOD OF UNNECESSARY DELAY BETWEEN ARREST AND ARRAIGNMENT

It now is clear that only "threshbold" confessions and admissions may be used against defendants. Compare Greenwell v. United States, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964) with Perry v. United States, 118 U.S. App. D.C. 360, 336 F.2d 748 (1964). Particularly close scrutiny must be given to pre-arraignment admissions when, as here, defendant is arrested without a warrant. See D.C. Code §4-140(1961) (suspect to be taken before proper court "immediately and without delay"); Greenwell v. United States, supra, 119 U.S. App. D.C. at 46 n. 5, 336 F.2d at 965 n.5. Judge Burger has said of persons arrested without a warrant:

> Once probable cause is established. . . formalities of booking should be disposed of promptly and the suspect taken to the judicial officer for his warning and hearing. Spriggs v. United States, 118 U.S. App. D.C. 248, 253, 335 F.2d 283, 288 (1964) (dissent).

According to the Government's evidence in the case at bar, defendant was arrested for being drunk in public

between 2:30 and 3:00 a.m. on April 21, 1965. (Transcript, pp. 6-8). After arresting and questioning defendant, the police took him to Ninth Precinct headquarters where the police made an investigation to determine whether the car involved in this case had been stolen. (Transcript, p. 9). Subsequently, the police lodged an additional charge of unauthorized use of a vehicle against defendant, and thereafter, at approximately 4:00 a.m., or more than one hour after arrest, according to police testimony, defendant "admitted that he had been in the car. . . ." (Transcript, p. 10). The record does not show when defendant was brought before a judicial officer to be advised of his rights, but this Court may take judicial notice that, in the District of Columbia, judicial officers ordinarily are not available to advise suspects between the hours of 2:30 and 4:00 a.m.[10/]

10/ When the Mallory question was raised at trial, the prosecution did not claim that defendant had been presented to a judicial officer before making the challenged admission, and the District Court failed to accord any opportunity for amplifying the record on this point. Hence, it must be assumed that defendant was not advised of his rights by a judicial officer before he made the statement in issue. Moreover, there is nothing to show that the police advised him of his rights.

Assuming arguendo that public intoxication, without more, is a criminal offense,[11] the police had ample probable cause when they arrested defendant between 2:30 and 3:00 a.m. The arresting officer testified that he observed that defendant "was staggering down the street, unsteady on his feet and had a very strong odor of alochol [sic] on his breath." (Transcript of Motion to Suppress, p. 15) In these circumstances, no further interrogation was needed to establish probable cause.

On the record here, the admission of defendant's statement that he had been in the stolen car cannot be justified on the ground that it was "given at the 'threshhold' in response to the initial questioning by police." Alston v. United States, App. D.C. , , 348 F.2d 72, 73 (1965) (Bazelon, C.J.). According to the Government's own evidence, the statement was not made until over an hour after arrest and was not included in the statement elicited from defendant at the time and scene of his arrest. (Transcript, p. 9; Transcript of Motion to Suppress, p. 12). Nor did the Government discharge its burden of establishing

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[11] For defendant's argument to contrary, see above, pp. 17 - 33.

that defendant made the admission voluntarily after having been advised of his right to remain silent. See Alston v. United States, supra. (McGowan, J. concurring).

> [W]hen dealing with an arrested person 'during a period of unnecessary delay within the meaning of Rule 5,' courts look with great suspicion on 'evidence that so-called "willing" but unwarned and uncounselled accused' consented voluntarily to cooperate with the police. Greenwell v. United States, supra, 119 U.S. App. D.C. at 49, 336 F.2d at 968.

At the trial below, the prosecutor sought to justify use of defendant's statement solely on the ground that it was exculpatory, stating "that is no crime." (Transcript, p. 10). Yet, the trial court granted the prosecutor's request (over defendant's objection) to instruct the jury to the contrary. The trial court instructed the jury that being a passenger in a stolen car constituted a violation of the unauthorized use statute (D.C. Code, § 22-2204), provided only that the passenger had knowledge that the car was stolen. (Transcript, p. 64). Although defendant submits that this instruction constituted a fatal variance from the indictment and was not supported by the evidence considered as a whole (see below, pp.48-53) it appears to be a correct statement of the law. See

Allen v. United States, 103 U.S. App. D.C. 184, 257 F.2d 188 (1958); Williams v. United States, 94 U.S. App. D.C. 219, 215 F.2d 35 (1954).

In any event, the Government cannot simultaneously claim that the statement was exculpatory and rely on an instruction which would permit the jury to predicate a guilty verdict on the statement. Accordingly, since the statement was made during a period of illegal detention, its use in evidence requires a new trial.

IV

THE COURT ERRONEOUSLY INSTRUCTED THE JURY ON AN ISSUE NEITHER RAISED BY THE INDICTMENT NOR SUPPORTED BY THE EVIDENCE

At the prosecution's request (Transcript, p. 57) and over defendant's objection[12] (Transcript, pp. 68-69), the court instructed the jury:

> Now, being a passenger in a stolen car, if the defendant knew it was stolen, constitutes an unauthorized use of the vehicle. (Transcript, p. 64).

Defendant informed the District Court that his ground for objecting to this instruction was that it deviated from the indictment. (Transcript, pp. 68-69).

The indictment charged that defendant:

> feloniously did take, use, operate and remove, one certain automobile . . . and did operate and drive said automobile for his own profit, use and purpose . . . . [Emphasis added]

The complaint underlying this indictment charged only that defendant:

12/ Defendant's objection was made immediately upon the conclusion of the charge, before the jury retired, and afforded the District Court ample time to make a correction. See Rule 30, Fed. R. Crim. P., Rucker v. United States, 92 U.S. App. D.C. 336, 206 F.2d 464 (1953); Thomas v. United States, 151 F.2d 183 (6th Cir. 1945).

> did without consent of the owner thereof, take and remove from a lot . . . and operate and drive for his own profit, use, or purpose a certain motor vehicle . . . . [Emphasis added]

There is nothing in either the complaint or indictment which reasonably could be construed as putting defendant on notice that he was being charged with having ridden in the stolen car in any capacity other than as driver.

The prosecution's entire case was devoted to proving that defendant drove the stolen car--proof inconsistent with the passenger instruction. The first police witness testified that he saw defendant driving the car (Transcript, p. 7); the second police officer testified that he saw defendant alight from the driver's seat and that he was "certain" that it was defendant who was driving. (Transcript, pp. 50-52).

The only scintilla of evidence that defendant was a passenger was Private Garrison's testimony that, over one hour after arrest and before arraignment, defendant stated he had been in the car but had not been driving. Opposing defendant's Mallory rule objection to the introduction of this testimony, the prosecutor maintained that the statement was exculpatory. Then, in requesting the passenger instruction, the prosecutor relied on the statement to help convict defendant. Certainly, the

Government cannot be permitted to have it both ways.

If the statement was incriminating rather than exculpatory (and defendant maintains it was incriminating), its admission violated the Mallory rule, and a new trial is required. (See above, pp. 36-40) If, on the other hand, the statement should be deemed exculpatory, then it cannot serve as support for the passenger instruction, and a new trial still is required.[13]

It is error to instruct a jury on a theory of the case not charged in the indictment and not supported by evidence. Sinclair v. United States, 49 App. D. C. 351, 265 Fed 991 (1920); Velasquez v. United States, 244 F.2d 416 (10th Cir. 1957); Thomas v. United States, supra n.12, 151 F.2d 183 (6th Cir 1945). As Judge Prettyman has put it, "A charge to a jury should be drawn with reference to

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[13] Even if this Court should find that admission of the statement, although incriminatory, was proper, that single admission, standing alone in the context of the Government's contradictory evidence, is not sufficient to support the passenger instruction, particularly since the indictment failed to raise the issue.

the particular facts of the case on trial." Collazo v. United States, 90 U.S. App. D. C. 241, 246, 196 F.2d 573, 578, cert. denied, 339 U.S. 987 (1952); see Vinci v. United States, 81 U.S. App. D.C. 386, 159 F.2d 777 (1947); Clifton v. United States, 54 App. D.C. 104, 295 Fed 925 (1923); Hamilton v. United States, 26 App. D.C. 382 (1905); Harris v. United States, 8 App. D.C. 20 (1896).

In the Sinclair case, supra, the defendant was convicted of manslaughter under an indictment which charged that he "feloniously, wantonly, recklessly, and negligently did drive and run" an automobile "at a great and unlawful rate of speed," thereby causing his passenger to be thrown out of the car and killed. This Court ruled that that indictment charged defendant with very specific acts of negligence, namely, unlawful speeding and reckless driving. It held it error for the trial court to have instructed the jury to return a guilty verdict if they found that "some negligent act of this defendant or negligent omission to act on the part of this defendant" caused the passenger's death. The Court criticized this instruction because, under it, "the jury could have predicated its verdict of guilty upon acts of negligence outside of those charged in the indictment." (49 App. D.C. at 353, 265 Fed. at 993).

Likewise, in the case at bar, the court's passenger instruction would have permitted the jury to predicate its verdict of guilty upon a set of facts not charged in the indictment.

In the Thomas case, supra, the Sixth Circuit reversed a conviction of conspiracy to violate the Espionage Act 14/ because the trial court instructed that defendant was charged with violating the Act although the indictment merely charged a conspiracy.

Since there was no foundation either in the indictment or the evidence for the passenger instruction, defendant's conviction cannot. It cannot be held, as it was in Berger v. United States, 295 U.S. 78 (1935), that the variance between the indictment and the instruction affected no substantial rights. In the Berger case, the indictment charged one general conspiracy, but the evidence showed several specific conspiracies, and the jury was instructed on several conspiracies. The several conspiracies, as to which there was evidence in the Berger case, all were included within the scope of the large general conspiracy charged in the indictment. Accordingly,

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14/ Act of June 15, 1917, § 2, 40 Stat. 218, repealed by Act of June 25, 1948, § 21, 62 Stat. 862.

defendant there was placed on notice as to the character of the case against him. Moreover, defendant had an opportunity at trial to rebut the evidence on which the instructions were based. In any event, the Berger case was limited to its facts by Kotteakos v. United States, 328 U.S. 750 (1946).

Here, defendant had no notice that the Government would seek to convict him on the basis that he had been a passenger in the stolen car. To the contrary, the prosecutor claimed that defendant's alleged statement to this effect was exculpatory. Yet, it cannot be said that the jury's verdict was not predicated upon the passenger theory. In these circumstances, it would be intolerable to permit defendant to be convicted on the basis of a set of facts that he could not have known the Government was claiming until the Government requested the passenger instruction.

CONCLUSION

For the reasons set forth above under Points I-IV, or for any one of them, the Court should reverse the judgment of conviction with orders that a new trial be granted.

Respectfully submitted,

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January 17, 1966

NOTE: Counsel wishes to acknowledge with thanks the research assistance of Paul A. Mutino of Catholic University Law School, which assistance was arranged by the Law Student Assistance Program of the Junior Bar Section, D. C. Bar Association.

APPENDIX A

ARRESTS FOR DRUNKENNESS

City	1961	1962	1963	1964
Baltimore	7,688	7,802	7,902	9,233
Chicago	--	76,094	66,760	69,488
Cleveland	16,794	16,778	16,878	15,010
Dallas	45,291	32,538	24,228	22,681
Detroit	7,022	6,879	7,488	7,034
Houston	32,570	29,545	30,616	29,645
Los Angeles	87,181	86,180	80,805	72,083
Milwaukee	18,553	17,955	17,575	17,912
Philadelphia	38,793	44,436	41,470	39,747
San Francisco	27,297	27,538	26,295	24,410
Washington, D. C.	43,542	47,167	45,081	44,124

APPENDIX B

ARRESTS FOR DRUNKENNESS

Rate - Arrests per 100,000 Population

City	1961	1962	1963	1964
Baltimore	818.7	851.2	866.1	999.2
Chicago	---	2,178.8	1,910.2	1,949.5
Cleveland	1,917.0	1,944.6	1,901.9	1,731.2
Dallas	6,663.5	4,503.0	3,240.9	2,903.0
Detroit	420.4	417.7	459.8	423.2
Houston	3,471.5	2,945.6	2,983.5	2,810.0
Los Angeles	3,516.8	3,347.9	3,037.1	2,699.6
Milwaukee	2,502.7	2,361.7	2,360.5	2,397.6
Philadelphia	1,937.2	2,205.7	2,134.2	1,935.3
San Francisco	3,674.6	3,723.6	3,523.4	3,256.8
Washington, D. C.	5,699.5	6,016.2	5,649.2	5,460.9

REPLY BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,762

JAMES R. GOODMAN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee,

THOMAS C. MATTHEWS, JR.*
JOHN J. COLLINS*
ALICE P. WEGMAN

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March 7, 1966

Circuit

FILED MAR 1966

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,762

JAMES R. GOODMAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From Judgment of the United States
District Court for the District of Columbia

REPLY BRIEF

Defendant's warrantless arrest cannot be sustained on the basis of facts which did not cause the police officer to make that arrest. The Government's attempt to do so would lead to grave injustice in this and future cases and is unsupported by authority.

Private Garrison testified below that he arrested defendant solely because he was "drunk" (Transcript, Motion to Suppress, p. 12, Transcript, p. 8). His decision to arrest defendant was solely based on his observations that defendant "was staggering down the street, unsteady on his feet and had a very strong odor of alcohol on his breath." (Transcript, Motion to Suppress, p. 15). Although Private Garrison testified that he had observed defendant, but not his companion, behind the wheel of an automobile, it was not this distinction which formed the basis for his decision to arrest only the defendant. When asked why he arrested the defendant, and not his companion, Goodwin, the officer stated, "Mr. Goodman was drunk. Mr. Goodwin was not." (Transcript, Motion to Suppress, p. 15). The record is clear that Private Garrison at no time considered defendant's driving as the ground, or as part of the grounds, for arresting him. (Transcript, Motion to Suppress, pp. 12-17, 18-19).

In the case at bar the prosecutor cannot justify defendant's arrest by hindsight reference to a fact which the police did not take into account even if this were permissible as a matter of

law. Here, the trial court rejected defendant's attempt to rebut the testimony with which, on appeal, the Government seeks to justify his warrantless arrest. See Brief for Appellant, pp. 34-42. Surely, the court cannot deny the defendant his day in court to disprove the existence of facts upon which the Government now seeks to rely. The Government's "harmless error argument"[1] under Point II with respect to rejection of defendant's proffer of impeaching evidence cannot be reconciled with its inconsistant attempt under Point I to avoid defendant's argument that the conduct for which he was arrested did not constitute a criminal offense.

Neither of the cases on which the Government rests its entire argument under Point I[2] provides any authority for hind-sight justification of an arrest by facts not taken into account

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[1] Brief for Appellee, pp. 7-9.

[2] Payne v. United States, 111 U.S. App. D. C. 94, 294 F.2d 723. Cert. denied, 368 U.S. 883 (1961); Bell v. United States, 102 U.S. App. D. C. 333, 254 F.2d 82 (1958)

by the police at the time of the arrest. The Payne and Bell cases, n. 2 supra, hold that the validity of an arrest depends on the facts and circumstances which caused the police to act, not on whether the police were able to articulate the legal conclusions to be drawn from these facts and circumstances. In neither case did the Court uphold an arrest by reference to facts which did not motivate the police to act.

In Payne v. United States, supra, the defendant was arrested by policemen who had been told that defendant had committed a criminal offense, and who observed defendant speeding away in a car. When the police stopped defendant's car, they discovered a large roll of money on the floor. Defendant was subsequently arrested for "investigation" and later charged with grand larceny. The court merely held that, in those circumstances, the officers' arrest of defendant was based on information sufficient for them to believe either that defendant was planning to take a victim's money by stealth or by trick, both of which are felonies.

> . . .the officers had probable cause to believe that a felony had been committed, and that the culprits were trying to escape in a speeding car. Arrest without a warrant was therefore proper.

Unlike the situation in the case at bar, Payne's arrest was based on the very facts which constituted the offense for which he was charged and convicted. The Payne case merely holds that the police failure to articulate the name of this offense was immaterial.

Similarly, in Bell v. United States, supra, defendant was arrested for suspicion of having committed the offense for which he was later booked. The holding of the court is merely that, although "suspicion" was not an offense warranting an arrest, the officers actually had more than suspicion -- they had "probable cause" to arrest.

In determining whether the arrest was valid, the court in the Bell case did not look beyond the facts which motivated the arresting officer. Instead, the court sought to determine whether the facts considered by the officer in making his arrest would have given an experienced policeman reasonable grounds to believe that a felony had been committed. In Judge Prettyman's words:

> A fact which spells reasonable cause to a doctor may make no impression on a carpenter, and vice versa. . . . An officer experienced in the narcotics traffic may find probable cause in the smell of drugs and the appearance of paraphernalia which to the lay eye is without significance.
>
> * * * * * *
>
> The question is not what name the officer attached to his action, it is whether, in the situation in which he found himself, he had reasonable ground to believe a felony had been committed and that the men in the car had committed it. (102 U.S. App. D.C. at 387, 254 F.2d at 66) [Emphasis added]

In cases far closer on their facts to the case at bar than either Payne or Bell, the Fifth Circuit has held squarely that arrests can be justified only on the basis of those facts which the arresting officers actually took into account. Staples v. United States, 320 F.2d 817 (5th Cir. 1963); Collins v. United States, 289 F.2d 129 (5th Cir. 1961). In the Collins case, the Fifth Circuit said:

> It may be that Collins could have been validly arrested as an accessory before the fact for attempts to commit larceny, . . . or that he could have been validly arrested for contributing to the delinquency of a minor child or children . . . . We need not decide whether Collins could have been so validly arrested for the evidence does not show that either of those charges was ever placed against him. 289 F.2d at 132)

See Mares v. United States, 319 F.2d 71 (10th Cir. 1963), where the court summarily dismissed one of the Government's arguments in support of a warrantless arrest, saying, "it is doubtful that the arrest was made with that offense in mind." (319 F.2d at 75)

The Fourth Circuit case cited by the Government[3/] holds only that the label attached by the arresting officer is unimportant. In that case, however, the Fourth Circuit unnecessarily sought to distinguish the Staples case on the ground, among others, that a Florida Statute required officers making arrests without warrants to inform the person arrested of the cause of his arrest.[4/] This distinction will not withstand analysis because the common law is clear that when a policeman notifies a suspect of the reason for his arrest, he must give the actual ground for that arrest. As the Restatement puts it:

3/ Ralph v. Pepersack, 335 F.2d 128 (4th Cir. 1964), cert. denied, 380 U.S. 925 (1965), cited at page 6, Brief for Appellee.

4/ Section 901.17, Florida Statutes Annotated.

> [I]f a peace officer who reasonably suspects another of having committed murder, when arresting the other for murder, manifests to him that the arrest is made for perjury or for a misdemeanor, the arrest is not privileged, although the actor reasonably suspects the other of perjury or the other is actually commiting a misdemeanor in the actor's presence, so that the actor would be privileged to arrest him for it. (Restatement, 2d Torts, §128, Comment b)

See also 5, Am. Jur. 2d, Arrest, Section 71.

There is a significant distinction between looking behind the policeman's legal conclusions to the operative facts, and permitting the Government to justify an arrest on facts which were not considered by the police at all. This court permitted the former in Payne and Bell but the Government seeks to do the latter in the case at bar although that was disapproved in Staples and Collins.

In the first instance, the defendant has notice and opportunity to explain or rebut all the facts relied on to support his arrest. In the second instance, after trying to rebut all the facts apparently supporting his arrest, he is suddenly confronted by new facts which he is given no opportunity to rebut.

The case at bar is a particularly striking illustration of the injustice that would flow from the position which the Government urges the court to adopt. Here, defendant did seek to rebut the evidence on which the prosecutor relies to justify his warrantless arrest. But, the trial court refused to grant defendant an opportunity to rebut the arresting officer's testimony on this crucial point. Moreover, defendant did not seek to rebut this evidence at the time of the Motion to Suppress because both counsel for the defendant and the trial court felt that this point was irrelevant. (Transcript, Motion to Suppress, p. 26, 29).

Depriving a defendant of an opportunity to test the legality of his arrest is not the only evil in the policy of hindsight justification for arrests which the Government would have the court adopt. Such policy not only would encourage groundless arrests but also would flout the requirement that the Government must demonstrate the cause of the arrest to a magistrate without "unnecessary delay." Three justices of the Supreme Court have noted with disapproval the "time-honored"

practice of the police "to arrest a man on one charge (often a minor one) and use his detention for investigating a wholly different crime." United States v. Carignan, 342 U.S. 36, 46 (1951) (Concurring opinion by Justices Douglas, Black and Frankfurter.) Permitting the illegality of an arrest to be cured at the courthouse by a showing that there was an offense for which the accused could have been arrested would open the door to the very abuses which are sought to be cured by Rule 5(a) Fed. R. Crim. P., and Section 4-140, D. C. Code.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19762

JAMES R. GOODMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS,
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FRANK Q. NEBEKER,
THOMAS LUMBARD,
Assistant United States Attorneys.

Cr. No. 614–65

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 8 1966

Nathan J. Paulson
CLERK

QUESTIONS PRESENTED

1. Was appellant properly arrested for driving under the influence of alcohol in violation of 40 D.C. Code § 609(a)?

2. Was excluding testimony regarding a defense experiment, proffered to disprove a witness' ability to observe facts corroborated by other evidence, properly within the trial court's discretion, where appellant could not establish similar circumstances for the original observation and the experiment?

3. Was appellant's admission, made for an exculpatory purpose and not under coercive circumstances, within forty-five minutes of appellant's arrest for unauthorized use while already properly in police custody, properly admitted into evidence?

4. Was the court's instruction, that defendant was guilty of unauthorized use if he was a passenger in a stolen car with knowledge that the car was stolen, properly within the scope of the indictment?

208-354—66——1

INDEX

	Page
Counterstatement of the case	1
Summary of argument	4
Argument:	
I. Appellant was properly arrested for driving under the influence of alcohol	5
II. Rejecting appellant's proffer of evidence regarding an experiment was not an abuse of the trial court's discretion, nor was appellant thereby prejudiced	6
III. The court properly admitted testimony of an uncoerced admission made by appellant	9
IV. The jury was properly instructed that a passenger with guilty knowledge is guilty of unauthorized use	12
Conclusion	13

TABLE OF CASES

Allen v. *United States*, 103 U.S. App. D.C. 184, 257 F. 2d 188 (1958)	12
Alston v. *United States*, — U.S. App. D.C. —, 348 F. 2d 72 (1965)	10
Bell v. *United States*, 102 U.S. App. D.C. 383, 254 F. 2d 82 (1958)	5
**Coor* v. *United States*, 119 U.S. App. D.C. 259, 340 F. 2d 784 (1964)	9, 10, 12
**Glass* v. *United States*, 328 F. 2d 754 (7th Cir. 1964)	13
Goodall v. *United States*, 86 U.S. App. D.C. 148, 180 F. 2d 397, *cert. denied*, 339 U.S. 987 (1950)	8N.
Greenwell v. *United States*, 119 U.S. App. D.C. 43, 336 F. 2d 962 (1964)	10
Guy v. *United States*, 71 App. D.C. 89, 107 F. 2d 288 (1940), *cert. denied*, 308 U.S. 525, 618, 640	9
Hardy v. *United States*, 118 U.S. App. D.C. 253, 335 F. 2d 288 (1964)	8
Heideman v. *United States*, 104 U.S. App. D.C. 128, 259 F. 2d 943 (1958)	11
**Hisler* v. *State*, 52 Fla. 30, 42 So. 695 (1906)	7, 8
Kemp v. *United States*, 114 U.S. App. D.C. 88, 311 F. 2d 774 (1962)	11, 12
**Milton Mallory* v. *United States*, 104 U.S. App. D.C. 66, 259 F. 2d 796 (1958)	11, 12
McIlrath v. *United States*, 88 U.S. App. D.C. 270, 188 F. 2d 1009 (1951)	12N.
Metoyer v. *United States*, 102 U.S. App. D.C. 62, 250 F. 2d 30 (1957)	11, 12
Millers Nat. Ins. Co. v. *Wichita Flour Mill Co.*, 257 F. 2d 93 (10th Cir. 1958)	8
Morton v. *United States*, 79 U.S. App. D.C. 329, 147 F. 2d 28, *cert. denied*, 324 F. 2d 875 (1945)	8N.
Naples v. *United States*, 113 U.S. App. D.C. 281, 307 F. 2d 618 (1962)	11, 13
Nye & Nissen v. *United States*, 336 U.S. 613 (1949)	13
People v. *DeFore*, 242 N.Y. 13, 150 N.E. 585 (1926)	6
**Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F. 2d 723 (1961)	5

	Page
People v. *Solani*, 6 Cal. App. 103, 91 Pac. 654 (1907)	6, 7
**People* v. *Woon Tuck We*, 120 Cal. 294, 52 Pac. 833 (1898)	6, 7
Ralph v. *Pepersack*, 335 F. 2d 128 (4th Cir. 1964), *cert. denied*, 380 U.S. 925 (1965)	6
Richardson v. *State*, 90 Md. 109, 44 Atl. 999 (1899)	7, 8
Saldania v. *Atchison, T., & S.F.R. Co.*, 241 F. 2d 321 (7th Cir. 1957)	8
Sinclair v. *United States*, 49 App. D.C. 351, 265 Fed. 991 (1920)	13N.
Smith v. *State*, 2 Ohio St. 511 (1853)	7, 8
Spriggs v. *United States*, 118 U.S. App. D.C. 248, 335 F. 2d 283 (1964)	10
State v. *Hedgepath*, 239 N.C. 33, 51 S.E. 2d 914 (1949)	6, 7, 8
State v. *Phillips*, 228 N.C. 595, 46 S.E. 2d 720 (1948)	6, 7
Stephens & Mackey v. *United States*, 115 U.S. App. D.C. 332, 319 F. 2d 733 (1963)	11, 12
Thomas v. *United States*, 151 F. 2d 183 (6th Cir. 1945)	13N.
United States v. *Burgos*, 269 F. 2d 763 (2d Cir. 1959), *cert. denied*, 362 U.S. 942	10
United States v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965)	9
United States v. *Mitchell*, 322 U.S. 65 (1944)	12
United States v. *Robinson*, 354 F. 2d 109 (2d Cir. 1965)	11
**United States* v. *Shaffer*, 291 F. 2d 689 (7th Cir. 1961)	13
United States ex rel. Stovall v. *Denno*, — 2 F. 2d — (No. 29208, 2d Cir., decided January 31, 1966)	11
Williams v. *United States*, 94 U.S. App. D.C. 219, 215 F. 2d 35 (1954)	12
Yates v. *People*, 32 N.Y. 509 (1865)	7

Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19762

JAMES R. GOODMAN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a judgment of conviction for Unauthorized Use of a Motor Vehicle, 22 D.C. Code § 2205, entered by the District Court for the District of Columbia on October 12, 1965.

George C. Duval testified that he found his 1960 Volkswagen sedan missing from a parking garage at 901 11th Street NW. at 9:30 p.m., April 16, 1965, having left it in the custody of the attendant at 7:30 p.m., and that he identified the car at the Ninth Precinct on April 21 (R. 22–24). Neither Mr. Duval nor the attendant had given permission to appellant or to anyone else to take the car from the garage (R. 24, 26).

Appellant was seen driving the same Volkswagen at 10th Street and Massachusetts Avenue NE. between 2:30 and 3:00 a.m. on April 21 by Private Norman L. Garrison of the Metropolitan Police Department (Motion to Suppress Transcript [hereinafter M.S. Tr.] 11; R. 6–7). Garrison saw appellant park the car on 10th Street just south of Massachusetts, and

saw appellant and one Goodwin alight from it, appellant from the driver's side (M.S. Tr. 11; R. 8, 16–17). Appellant and Goodwin walked up to Massachusetts Avenue; appellant was "staggering, very unsteady on his feet" (R. 8; M.S. Tr. 11, 15). They were about to enter the yard in front of 1013 Massachusetts Avenue (R. 8), a suspected place of vice which Garrison and other officers had under surveillance (R. 6), when Garrison and another officer approached and questioned them (R. 8, M.S. Tr. 11). Appellant had "a strong odor of alcohol" on his breath (M.S. Tr. 12), and Garrison placed him under arrest, officially charging him with being drunk in public, 25 D.C. Code § 128(a) (R. 8; M.S. Tr. 12). Questioned, appellant denied being in (M.S. Tr. 12) or driving (R. 9) the Volkswagen, said that he had no permit and had arrived there by cab (M.S. Tr. 12, R. 9). Searching appellant on the scene, Garrison found a Volkswagen key in his right rear trouser pocket (*Ibid.*). Garrison proceeded to the Volkswagen, used the key to start it, and drove it to the Ninth Precinct while appellant was being transported there by other officers (M.S. Tr. 12, 14; R. 9). Appellant was charged with Drunk and Driving after Revocation of his permit (M.S. Tr. 13; R. 9). After checking with the police teletype room, at 3:15 or 3:20 a.m. Garrison verified that the Volkswagen had been reported stolen (R. 9, 11), and charged appellant with Unauthorized Use of the Vehicle (R. 9–10). At approximately 4:00 a.m., in conversation with Garrison at the precinct, apparently when confronted with the fact that it was known the car was stolen, appellant admitted being in the car but denied driving it (R. 10). He was arraigned in the Court of General Sessions the same morning on charges of Drunk, Operating after Revocation, and Unauthorized Use. A preliminary hearing was held the same day on Unauthorized Use, at which appellant was ordered held for the Grand Jury (C.G.S. No. US 3496–65); the other charges were continued to April 27, when appellant was tried before Judge Barlow, convicted of both offenses, and given concurrent sentences of ninety days on each (C.G.S. Nos. DC 11005–65 [drunk], TR 10836–65 [traffic]).

Appellant was indicted for Unauthorized Use on June 1 and arraigned on June 4. He subsequently filed a motion to sup-

press evidence taken from him at the time of his arrest, which was heard and denied by Judge Jones on July 30.

Appellant was tried before Judge Corcoran and a jury on August 17.

At the trial, Private Garrison testified to the circumstances of his arresting appellant, including finding the key on appellant and using it to drive the Volkswagen to the precinct (R. 3–21), as outlined above. When Garrison testified concerning the admission appellant made at the precinct, appellant moved for a mistrial, which was denied (R. 10). The only other Government witnesses in chief were the complainant and the garage attendant (R. 21–26).

At the close of the government's case, appellant proffered the testimony of an investigator, one Reed, to impeach Garrison's testimony by showing he could not have seen what he said he saw inside the Volkswagen, since Reed "could not observe a man" at the same place under similar conditions (R. 27). Appellant was asked to present authorities for the admissibility of such evidence, and the proffer was rejected because of "too many possible differences in the conditions" (R. 47).

Appellant was the only witness in his own behalf, and testified that he had not even been in the Volkswagen but was arrested as he emerged from the "after-hours joint" at 1013 Massachusetts Avenue, having arrived there by taxicab (R. 30–46). In rebuttal, Detective Stern of the Metropolitan Police testified that he saw appellant park the car on 10th Street and alight from the driver's side (R. 48–54).

At the conclusion of the trial, the government requested an instruction that Unauthorized Use includes being a passenger in a car with knowledge it is stolen (R. 57), which was given (R. 64) and objected to by appellant at the close of the charge as a "deviation from the indictment" (R. 68–69). This objection was overruled (R. 69).

The jury found appellant guilty, and on October 11 Judge Corcoran sentenced him to twenty months to five years in prison, from which judgment he now appeals.

SUMMARY OF ARGUMENT

I

Appellant's motion to suppress was based solely on the argument that he was arrested for conduct not made criminal by the statute, 25 D.C. Code § 128(a), nor constitutionally within the statute, *i.e.*, merely being drunk on a public street, so that his arrest was illegal and the search of his person incident thereto was unreasonable. But although appellant was formally charged at that time only for drunkenness, the arresting officer had amply sufficient facts before him to arrest appellant for driving under the influence of alcohol, 40 D.C. Code § 609(b), and the arrest was therefore unquestionably legal. Moreover, appellant's conduct fell squarely within the terms of Section 25–128(a), nor is that statute unconstitutional if construed to cover "mere" public drunkenness, a common-law offense which is prohibited by statute in most American jurisdictions.

II

Appellant proffered testimony concerning an experiment, which was excluded. The admission or rejection of this testimony was a matter for the discretion of the trial court, which exercised that discretion properly. Appellant had not shown the circumstances obtaining during the observations by the witness whose opportunity to observe he sought to impeach by the experiment; accordingly, he could not show that the circumstances were substantially similar during the experiment, a prerequisite to admission of such evidence. Moreover, the experiment was offered to impeach testimony amply corroborated by other evidence, and its exclusion was not prejudicial.

III

The admission which appellant challenges was made within an hour or an hour and a half of appellant's original arrest for drunk. Appellant was not arrested for Unauthorized Use, since no probable cause arose for his detention on that offense, until forty or forty-five minutes before the admission, which was apparently freely given in conversation with the arresting of-

ficer for an exculpatory purpose; thus the *Mallory* rule, appellant's sole objection to the testimony, was not violated.

IV

Appellant's objection to the charge claimed only that the court could not instruct on the theory that he was a passenger with knowledge the car was stolen, since the indictment charged him with taking, driving, and operating the car. But such a passenger may be charged as a principal, as an aider and abettor, and it is well established that instructions on aiding and abetting do not deviate from an indictment which charges the commission of an offense.

ARGUMENT

I. Appellant was properly arrested for driving under the influence of alcohol

(M.S. Tr. 9–19, 25–26)

Appellant urges that the testimony about the key was inadmissible because his arrest was "based on non-criminal conduct, namely, [being] drunk in public." Brief ii, 17.

Appellant misconstrues the operative facts when he claims he was arrested for "drunk in public" and nothing more. Private Garrison testified that he saw appellant driving a car; that he then saw appellant get out of the driver's side of the car; and that he then saw appellant stagger and smelled alcohol on his breath. Appellee does not concede that appellant was not validly arrested if he was arrested for "drunk in public" alone; but appellee urges that appellant was also validly arrested for violating 40 D.C. Code § 609(b) by driving under the influence of alcohol. True, appellant was not formally charged with that offense, but it is the existence of probable cause on the facts before the officer, not the officer's legal interpretation of those facts, which determines the legality of a search incident to the arrest. Not "booking" a defendant on a charge does not indicate there was no probable cause to arrest him for that charge. *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F. 2d 723 (1961); *Bell* v. *United States*, 102 U.S. App. D.C. 383, 254 F.

208-354—66——2

2d 82 (1958). *Ralph* v. *Pepersack*, 335 F. 2d 128 (4th Cir. 1964), *cert. denied*, 380 U.S. 925 (1965), involved a man arrested on facts giving probable cause to believe he had committed three felonies, whom the police thought they had only arrested for "investigation;" the court found the facts, not the officer's label, controlling. Surely this is not a case where, in Cardozo's classic phrase, "The criminal is to go free because the constable has blundered," *People* v. *DeFore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926); here the "blunder" did not impinge on appellant's rights, under the Fourth Amendment or otherwise. He was validly arrested under 40 D.C. Code § 609(b), and the search incident thereto was therefore reasonable.

II. Rejecting appellant's proffer of evidence regarding an experiment was not an abuse of the trial court's discretion, nor was appellant thereby prejudiced

(R. 6–7, 12–14, 27–28, 46–47)

Appellant proffered testimony by one Robert J. Reed, whom he states was an "experienced investigator," as to an experiment performed on the scene where Private Garrison testified that he saw appellant driving the stolen Volkswagen (R. 27–28, 46–47). Appellant claims that exclusion of this testimony, offered for the purpose of impeaching Private Garrison's ability to observe, was reversible error.

The trial court properly excluded the experiment testimony, as appellant laid no predicate, either through cross-examination of Private Garrison or in his own testimony, to establish the circumstances existing at the time to which Private Garrison's testimony applied. It is well established, as appellant urges, that experiment testimony is admissible only if the experiment was conducted under circumstances "substantially similar" to those of the testimony which the experiment is offered to impeach. *State* v. *Hedgepeth*, 239 N.C. 33, 51 S.E. 2d 914 (1949); *State* v. *Phillips*, 228 N.C. 595, 46 S.E. 2d 720 (1948); *People* v. *Solani*, 6 Cal. App. 103, 91 Pac. 654 (1907). To establish any degree of similarity, however, the original circumstances must be established. *People* v. *Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833 (1898).

Here, appellant did not establish whether Private Garrison observed appellant wholly with the naked eye, or whether he used binoculars, which he might well have had with him to observe a "vice establishment" at 1013 Massachusetts Avenue (R. 6). Appellant established where Private Garrison was standing at one point of his observations (R. 12–14), but not where he was after he walked towards the car (R. 7) or where he was when he saw the car parked. Similar positions of the objects or persons must be shown if an experiment is to disprove the original testimony. *Hisler* v. *State,* 52 Fla. 30, 42 So. 695 (1906). Perhaps more significantly, appellant did not establish the lighting conditions when Private Garrison was on watch: the location of street lights, what other sources of light, such as automobile headlights, illuminated the area and the people he said he saw, or whether the interior light of the car was on at any time. In *Richardson* v. *State,* 90 Md. 109, 44 Atl. 999, 1000–1001 (1899), on which appellant heavily relies, the court notes that the proffer of an experiment included similarity of lighting conditions, which the court noted to have been absent from the proffer refused in *Yates* v. *People,* 32 N.Y. 509 (1865). See also *People* v. *Woon Tuck Wo, supra.* Without establishing the original conditions, appellant could not establish similarity, and his proffer was properly refused.

Even had appellant established similarity of circumstances, moreover, there was no error in excluding testimony of this experiment. Appellant cites no authority that testimony of a single witness as to opportunity-to-observe experiments is admissible. Both *Richardson* and *Hedgepeth, supra,* as well as *Smith* v. *State,* 2 Ohio St. 511 (1853), which he cites, involved several witnesses who performed the experiment of trying to see similar things. In *State* v. *Phillips, supra,* expert testimony as to several experiments at different distances to show whether the murder weapon would leave powder burns was held properly admitted; in *People* v. *Solani, supra,* defendant's proffer of a single similar experiment was held properly rejected.

Finally, exclusion of this evidence, even if error, was not prejudicial to appellant, and should be deemed harmless error under Rule 52(a), F.R. Crim. P. It is well established that

admissibility of experiment evidence is a matter for the discretion of the trial court. *Hisler* v. *State, supra*, notes, 92 So. at 695, that

> "If, in the discretion of the trial court, such proffered evidence is rejected, the appellate court will not review the ruling unless an abuse of discretion appears."

In *Hardy* v. *United States*, 118 U.S. App. D.C. 253, 254, 335 F. 2d 288 (1964), this Court reversed only because the ruling excluding testimony of an experiment, "ordinarily * * * of scant significance, here took on particular importance." See also *Millers Nat. Ins. Co.* v. *Wichita Flour Mill Co.*, 257 F. 2d 93 (10th Cir. 1958); *Saldania* v. *Atchison, T. & S.F.R. Co.*, 241 F. 2d 321 (7th Cir. 1957). The standard, stated in *Smith* v. *State, supra*, 2 Ohio St. at 519, is whether the proffered experiment "might at least have raised a reasonable doubt in the minds of the jury." In *Smith*, as in *Richardson* v. *State* and *State* v. *Hedgepeth, supra*, the three apposite cases cited by appellant,[1] the experiment would have disproved a vital central element of the prosecution case, an eyewitness identification otherwise uncorroborated (except in *Richardson*, where corroboration was by testimony of the complainant, whose veracity was seriously undermined). In all three cases, as in *Hardy* v. *United States, supra*, the very presence of the accused at the same scene could be questioned by the experiment.

That was not so here; appellant admitted he was on the scene. The experiment could only impeach Private Garrison's ability to observe a fact, appellant's driving the stolen car, which was corroborated by the key found on appellant and by Detective Stern's testimony on rebuttal. Moreover, Garrison's ability to observe was amply corroborated by his testimony that he went straight to the Volkswagen and drove it to the precinct. How did he know which car the key fit, if he did not see appellant alight from it, at the very least? Had the rejected evidence been admitted, a reasonable jury would still not have acquitted. As this Court said in *Guy* v. *United States*,

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[1] *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F. 2d 28, *cert. denied*, 324 F. 2d 875 (1945), and *Goodall* v. *United States*, 86 U.S. App. D.C. 148, 180 F. 2d 397, *cert denied*, 339 U.S. 987 (1950), both involved admissibility of chemical and ballistics tests, not of experiments.

71 App. D.C. 89, 90, 107 F. 2d 288, 290–91 (1940), *cert. denied*, 308 U.S. 525, 618, 640,

> "When guilt is clearly established by competent evidence, error in the admission or exclusion of other evidence * * * which does not affect the substantial rights of the accused does not call for the reversal of the conviction. * * * [N]o evidence which was offered by appellant, and excluded, would have materially weakened the government's case."

III. The court properly admitted testimony of an uncoerced admission made by appellant

(R. 6–11, 33, 39, 50; M.S. Tr. 7–9)

Appellant was arrested between 2:30 and 3:00 a.m., Wednesday, April 21, at 10th Street and Massachusetts Avenue NE., and questioned there (R. 6–9, 50). He and the Volkswagen he had driven to the scene were then taken to the Ninth Precinct, where Private Garrison made further inquiries to discover whether the car was stolen (R. 9). At about 3:15 or 3:20 a.m., he learned the Volkswagen had been reported stolen (R. 9, 11). Apparently [2] when confronted with the officer's knowledge, appellant attempted to exculpate himself by denying being the driver, but claiming to be a mere passenger.

Appellant objected to Private Garrison's testimony concerning this admission and moved for a mistrial, solely "on the ground that it was a violation of the Mallory Rule" (R. 10). Appellant made no claim below that he was not advised of his rights, and such a claim therefore cannot be considered here. See *Coor* v. *United States*, 119 U.S. App. D.C. 259, 260, 340 F. 2d 784 (1964); *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965).

First, it should be noted that appellant had been in police custody for an hour and a half, at most, when he made the

[2] Appellant did not seek to amplify on the circumstances regarding the conversation. Certainly no inference is compelled that the officer did more than confront appellant with his information. He would now like the Court to presume he was subjected to prolonged interrogation calculated to obtain a damaging admission. Such presumption would be unwarranted.

statement in question, and appellant himself testified he was arrested after 3:00 a.m., which would make it less than an hour (R. 33). Absent the coercive circumstances where police intensively question a suspect for purposes of obtaining a confession, see *Alston* v. *United States*, — U.S. App. D.C. —, 348 F. 2d 72 (1965); *Spriggs* v. *United States*, 118 U.S. App. D.C. 248, 252, 335 F. 2d 283 (1964), this court has held that admissions made fifty minutes after arrest do not violate the *Mallory* rule. *Coor* v. *United States, supra.* This is not a case where the police made a "detour" from presentment so that they could obtain a confession, see *Greenwell* v. *United States*, 119 U.S. App. D.C. 43, 336 F. 2d 962 (1964). Since appellant was lawfully arrested and was in a drunken condition, his presence at the precinct was not for purposes of delay and interrogation, as in *Spriggs* and *Alston.*

Moreover, it should be noted that appellant should be deemed arrested for Unauthorized Use only as of the time the police had probable cause to believe he had committed that offense, see *United States* v. *Burgos*, 269 F. 2d 763, 767 (2d Cir. 1959), *cert. denied* 362 U.S. 942, and he was in custody for that offense for only forty or forty-five minutes before he made the admission. Before he was charged with a felony, appellant was charged only with two misdemeanors under the D.C. Code, as to which Rule 5(a), F.R. Crim. P., did not apply under Rule 13, D.C. Ct. Gen. Sess., Crim. Div. He was, in fact, held on charges as to which he could post collateral at the Ninth Precinct and elect to forfeit that collateral without appearing in court, under D.C. Code §§ 16–704, 23–610; Order, D.C. Ct. Gen. Sess., Smith, C.J., Oct. 8, 1959; D.C. Ct. Gen. Sess. Crim. Div. Rules 5(I)(22), (23); and a time-honored practice of the Court of General Sessions, which accepts forfeiture of such collateral in lieu of a fine unless the Corporation Counsel requests a bench warrant for the accused, which is rare. Appellant, however, could not be released from the precinct until sufficiently sober that he would not be immediately rearrested for being drunk in public. The Metropolitan Police Department has also adopted a policy, unwritten so far as counsel can ascertain, of holding drunks for four hours or until such later time as they are sober enough to release. This was

merely commonsense; it was also proper police procedure. See *Milton Mallory* v. *United States*, 104 U.S. App. D.C. 66, 259 F. 2d 796 (1958), where a written confession was deemed admissible although made thirteen hours after arrest, since Mallory was incoherently drunk when first arrested. Accordingly, the period of detention which is relevant here is the forty or forty-five minutes between the appearance of probable cause to hold appellant for Unauthorized Use and his admission.

This period was evidently consumed by normal police procedures of preparing reports, contacting the complainant, Mr. Duval, and asking appellant what he knew about the thefts of the car and of the Maryland tag which was found on it. Appellant evidently continued to deny having anything to do with either, until he was confronted with the whole case against him, when he admitted *only* that he had been in the car. Appellant now denies this statement was exculpatory, but he confuses exculpatory *effect* with exculpatory *intent*; of course, appellant was trying to get himself released as a mere passenger with no guilty knowledge the car was stolen. See *Stephens & Mackey* v. *United States*, 115 U.S. App. D.C. 332, 319 F. 2d 733 (1963); *Kemp* v. *United States*, 114 U.S. App. D.C. 88, 311 F. 2d 774 (1962). Appellant was evidently an experienced car thief (R. 39, M.S. Tr. 7–9), familiar with the law; he knew a way out and he tried to use it. Compare *Naples* v. *United States*, 113 U.S. App. D.C. 281, 283–4, 307 F. 2d 618 (1962), where the admission laid groundwork for an insanity defense.

Was this questioning improper, or was it the duty of the police to question appellant? *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 259 F. 2d 943 (1958), and *Metoyer* v. *United States*, 102 U.S. App. D.C. 62, 250 F. 2d 30 (1957), both indicate the police may question an accused in custody. Indeed, where the facts before the police reveal probable cause to detain, but additional information may negate probable cause, they have a duty to seek such information, and the accused is its most likely source. See *United States* v. *Robinson*, 354 F. 2d 109 (2d Cir. 1965); *United States ex rel. Stovall* v. *Denno*, — F. 2d — (No. 29208, 2d Cir., decided January 31, 1966). Here, of course, appellant was in possession of a stolen car, but he might be able to explain that possession; for example, his companion,

Goodwin, might well be the true culprit, or he might identify another person who had lent him the car to show he did not know it was stolen, or Duval might have lent him the car and made a false report that it was stolen. Appellant now argues that such confrontation was prejudicial to him, but he would argue the other way had official failure to question him until after arraignment deprived him of opportunity to prove a defense.

It is well-established that subsequent detention does not render inadmissible an admission made at the outset. *United States* v. *Mitchell*, 322 U.S. 65 (1944); *Coor* v. *United States, supra; Naples* v. *United States, supra; Metoyer* v. *United States, supra.* Moreover, appellant's further detention is at least partially explained by his drunkenness, see *Milton Mallory* v. *United States, supra.* Appellant was promptly presented the same morning, and had a full preliminary hearing. His rights under Rule 5(a) were fully protected and his admission was properly used as evidence.

IV. The jury was properly instructed that a passenger with guilty knowledge is guilty of unauthorized use

(R. 68–69)

Appellant claims error in a portion of Judge Corcoran's charge which instructed the jury that a passenger in a stolen car who knows it to be stolen is guilty of Unauthorized Use. Appellant concedes this was a correct statement of the law, Brief pp. 47–48; he claims only that it deviated from the indictment.[2]

Under 22 D.C. Code § 2205, a passenger with guilty knowledge may be convicted as an aider and abettor. *Stephens & Mackey* v. *United States, supra; Kemp* v. *United States, supra; Allen* v. *United States*, 103 U.S. App. D.C. 184, 257 F. 2d 188 (1958); *Williams* v. *United States*, 94 U.S. App. D.C. 219, 215 F. 2d 35 (1954). He is as much in possession of recently stolen

[2] This was appellant's only claim of error below (R. 68–69), and his further claim that it was not supported by the evidence cannot be entertained here, as the trial court had no chance to consider it. *McIlrath* v. *United States*, 88 U.S. App. D.C. 270, 188 F. 2d 1009 (1951).

goods as the driver; indeed, he may be the thief, and the driver at the moment of apprehension merely his innocent chauffeur. As aider and abettor, he may be charged as a principal under 22 D.C. Code § 105. Accordingly, an instruction on aiding and abetting is not error even though the indictment charges only the commission of the offense. *Glass* v. *United States*, 328 F. 2d 754, 756 (7th Cir. 1964); *United States* v. *Shaffer*, 291 F. 2d 689, 693 (7th Cir. 1961); see *Nye and Nissen* v. *United States*, 336 U.S. 613 (1949). The instant charge amounted to an aider and abettor charge. Moreover, it was both concise and accurate, and clearer to the jury than an involved instruction would have been.[4]

In passing, we note that the instruction was warranted under the evidence. Appellant claims the "passenger" theory was shown only by the testimony as to his admission, exculpatory in intent, but damning in effect. However, he was evidently seen alighting from the vehicle, and (from which knowledge could be imputed) found with the key in his possession. The "passenger" instruction merely made it unnecessary for the jury to find as a fact that Garrison had seen him driving.

CONCLUSION

Wherefore, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[4] *Sinclair* v. *United States*, 49 App. D.C. 351, 265 Fed. 991 (1920), and *Thomas* v. *United States*, 151 F. 2d 183 (6th Cir. 1945), which appellant cites, are inapposite, as both involved instructions misleading the jury to convict for the offense charged if they found a different crime was proved.

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